

RENDERED: AUGUST 27, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001710-MR

COUNTY FISCAL COURTS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 08-CI-01851

COMMONWEALTH OF KENTUCKY,  
JUSTICE AND PUBLIC SAFETY CABINET,  
KENTUCKY DEPARTMENT OF  
CORRECTIONS; AND COMMONWEALTH  
OF KENTUCKY, FINANCE AND  
ADMINISTRATION CABINET

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

HENRY, SENIOR JUDGE: The County Fiscal Courts appeal from the dismissal of their declaratory judgment action (*see* KRS chapter 418), whereby they sought a declaration from the Franklin Circuit Court making the Commonwealth responsible for payment of the cost of housing prisoners who are in county jails and unable to obtain pretrial release from the time they are arrested on felony charges until they are convicted of a felony and sentenced. The circuit court granted the Commonwealth's motion to dismiss pursuant to Kentucky Rules of Civil Procedure (CR) 12.02 for failure to state a claim for which the requested relief may be granted. After our review, we affirm the judgment of the Franklin Circuit Court.

The County Fiscal Courts filed this action on November 7, 2008 against the Kentucky Department of Corrections and the Kentucky Finance and Administration Cabinet. An amended complaint was filed on December 30, 2008. The Finance and Administration Cabinet and the Department of Corrections then filed a motion to dismiss the entire five count complaint on February 4, 2009. The County Fiscal Courts agreed to the dismissal of Counts III, IV and V, leaving only Counts I and II of the complaint at issue. The essence of Count I was:

Because KRS 532.120(3) states that time in county custody is "considered for all purposes" as time spent in state custody, an inmate's time in county custody as a state prisoner should be treated as the state's financial obligation, and the Commonwealth should be required to reimburse the counties for fees incurred for housing such convicts.

Count II specified:

The application of KRS 441.025(1), KRS 431.215(2) and KRS 532.120(3) contravenes the mandates of § 254 of the Kentucky Constitution which places the responsibility for inmate upkeep on the Commonwealth, and relies upon designations and distinctions that have no rational or reasonable basis or purpose and are therefore arbitrary and capricious in violation of Section II of the Kentucky Constitution as well as other federal and state laws.

KRS 441.025(1) requires counties to provide a facility to house people arrested, sentenced or ordered to be held by any court in the county. The Commonwealth is required to pay the counties for housing a convicted felon pursuant to KRS 431.215(2) beginning the day after the prisoner is sentenced to serve time in a state penal facility until such time as the prisoner is actually delivered to the state facility.

KRS 532.120(3), which is part of the penal code, deals with the amount of credit given for time served in a county facility prior to conviction against the total sentence ordered served in a state facility. That statute specifically requires that “the time spent in custody prior to the commencement of the sentence shall be considered *for all purposes* as time served in prison.” KRS 532.120(3) (emphasis added). The inclusion of the phrase “for all purposes” in the statute engendered this lawsuit.

The Commonwealth interprets KRS 431.215(2) to require that counties are to be paid only when a prisoner has been sentenced and then remains in custody of the county for more than an additional day. After a person is arrested and charged with a felony, it is not uncommon for many months to pass before

conviction and final sentencing. The counties argue they should be paid retroactively for the entire time the prisoner is housed in a county facility. The counties rely on the language of KRS 532.120(3) stating that the time spent in custody prior to sentencing shall be considered “for all purposes” as time spent in prison.

Practically the same question at issue here was raised fourteen years ago in *Kentucky County Judge/Executive Ass’n Inc. v. Commonwealth*, 938 S.W.2d 582 (Ky. App. 1996). The Association and five counties joined in an action seeking to require the Commonwealth to pay the expenses of housing prisoners in county jails prior to their transfer to state custody. The version of KRS 431.215(2) in effect at that time allowed the Commonwealth a five-day grace period before its obligation to pay for the housing of a state prisoner in a county facility commenced. In that case we found that “the word ‘convict’ as used in Ky. Const. § 254, refers to one who has been found guilty . . . of a felony . . . and has been sentenced to serve time in a state penal institution.” *Id.* at 586. We additionally held that KRS 431.215(2) was “unconstitutional . . . to the extent that it allow[ed] the Commonwealth to delay reimbursement to county jails for five days after the entry of judgment.” *Id.*

In the current matter, the original five counties from the first case were joined by the remaining 115 counties in the Commonwealth under the aegis of the County Fiscal Courts. The Commonwealth sought dismissal on the basis of *res judicata*. Although the argument may be well taken, the trial court declined to

address the issue as one of *res judicata*. We will not review an issue that has not been decided by the trial court. *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

Instead, the trial court determined that “*res judicata* analysis is not necessary in ruling on the issues in this action. A plain reading of the statutes and constitutional provisions involved will suffice.” We agree.

“[W]here statutes seemingly conflict, it is the duty of the courts to harmonize them and give such construction as will permit both to stand, if such construction can reasonably be given.” *General Motors Acceptance Corp. v. Shuey*, 47 S.W.2d 968, 970 (Ky. 1932).

Kentucky Constitution § 254 states:

The Commonwealth shall maintain control of the discipline, and provide for supplies, and for the sanitary condition of the convicts, and the labor only of convicts may be leased.

The Kentucky Supreme Court interpreted that provision and defined “convicts” as “persons convicted of felonies and sentenced to confinement in the penitentiary[.]” *Campbell County v. Commonwealth, Kentucky Corrections Cabinet*, 762 S.W.2d 6, 7 (Ky. 1988), citing *Briskman v. Central State Hospital*, 264 S.W.2d 270, 271 (Ky. 1954). We later held a “convict” is “one who is convicted *and* sentenced to a state facility for a felony.” *Kentucky County Judge/Executive Ass’n* at 584 (emphasis in original).

KRS 532.120(3) provides:

[t]ime spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the court imposing sentence toward service of the maximum term of imprisonment. If the sentence is to an indeterminate term of imprisonment, the time spent in custody prior to the commencement of the sentence shall be considered for all purposes as time served in prison.

The County Fiscal Courts place a great deal of emphasis on the phrase “for all purposes” in this statute to support their argument. They contend that payment from the state for housing convicts is one of the contemplated “purposes” and such payment should therefore begin from the time a prisoner is initially in custody. Such an interpretation, however, would amount to a substantial *de facto* amendment, if not an outright repeal by implication, of KRS 431.215(2). That statute provides:

*When the judgment imposes a sentence of death or confinement in the penitentiary, the County in which the prisoner is incarcerated shall receive from the State Treasury a fee per day . . . ending the day the defendant is delivered to the penitentiary. The fee shall be paid to the county treasurer for use for the incarceration of prisoners as provided in KRS 441.025.*

KRS 431.215(2) (emphasis added). Repeal by implication is disfavored in the law; it is presumed that the legislature, being aware of the state of the law, will repeal all or part of an existing statute with a subsequent one only in the clearest of terms. *Galloway v. Fletcher*, 241 S.W.3d 819, 823-24 (Ky. App. 2007).

The clause of KRS 532.120(3) that specifies “for all purposes” is contained in the portion of the Kentucky Penal Code entitled “Calculation of Terms of Imprisonment.” The subject matter is clearly the calculations used to determine the length of any sentence imposed upon a prisoner. It has nothing to do with the financial aspects of housing prisoners. When KRS 532.120(3) is read so as to apply only to the penal code, there is no conflict with the other statutes or the provisions of §254 of the Kentucky Constitution.

KRS 441.025 requires the county to pay the costs of housing prisoners until they are sentenced. KRS 431.215 then requires the Commonwealth to pay the county for housing a prisoner once that prisoner is sentenced, that is, becomes a “convict” as defined in the cases and before that prisoner is placed in the custody of the state. KRS 532.120 applies only to the calculation of the duration of a sentence imposed upon a prisoner and nothing more. This interpretation is in harmony with the constitution and allows the statutes to co-exist without conflict. The statutes and cases, when read together, point inescapably to the conclusion that the Commonwealth becomes financially responsible for the costs of housing prisoners in county jails only after they have been convicted and sentenced for a felony.

While we are convinced that the law overwhelmingly compels us to affirm the decision of the trial court, we are not unsympathetic to the plight of the Fiscal Courts, which are burdened with often staggering expenses of housing prisoners whose state sentences sometimes are substantially or even wholly served

in financially overburdened county jails, as when a prisoner convicted of a felony is sentenced only to “time served.” While we appreciate the hardship thus imposed on county jails and county governments, our role in this case is merely to determine whether or not the trial court decided correctly according to the law. Dismissal pursuant to CR 12.02 is appropriate when “the pleading party appears not to be entitled to relief under any state of facts which could be proved in support of the claim.” *Weller v. McCauley*, 383 S.W.2d 356, 357 (Ky. 1964). Agreeing with the trial court’s interpretation of the pertinent statutes, we find that to be the case here.

The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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